

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WILLIAM H. BYFIELD</b>	)		
Claimant	)		
VS.	)		
	)	Docket Nos.	181,219
<b>THE BOEING COMPANY - WICHITA</b>	)		181,220
Respondent	)		181,221
AND	)		181,222
	)		
<b>AETNA CASUALTY &amp; SURETY</b>	)		
Insurance Carrier	)		
AND	)		
	)		
<b>KANSAS WORKERS COMPENSATION FUND</b>	)		

**ORDER**

Respondent appeals from the Awards of Special Administrative Law Judge William F. Morrissey entered on May 17, 18 and 22, 1995 in Docket Nos. 181,219, 181,220 and 181,221, respectively. Claimant appeals from the Award entered by Special Administrative Law Judge William F. Morrissey entered on May 19, 1995 in Docket No. 181,222.

**APPEARANCES**

Claimant appeared by his attorney Michael L. Snider of Wichita, Kansas. Respondent and its insurance company appeared by their attorney Frederick L. Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney Edward D. Heath, Jr. of Wichita, Kansas.

**Docket No. 181,219**

**RECORD**

The Appeals Board has considered the record listed in the Award of the Special Administrative Law Judge.

**STIPULATIONS**

The May 17, 1995 Award of the Special Administrative Law Judge does not contain the stipulations of the parties. They are as follows:

- (1) Sedgwick County is the county in which it is claimed that claimant met with personal injury by accident.
- (2) Claimant alleges he met with personal injury by accident on February 1, 1991 and on each day worked thereafter.
- (3) Whether claimant's alleged accidental injury arose out of and in the course of his employment was an issue before the Special Administrative Law Judge. However, it has not been raised as an issue on appeal and is therefore deemed admitted.
- (4) Notice was an issue before the Special Administrative Law Judge, however it has not been made an issue on appeal. Therefore, it is deemed admitted.
- (5) The relationship of employer and employee existed on the accident dates alleged.
- (6) The parties are covered by the Kansas Workers Compensation Act.
- (7) There was an issue of timely written claim before the Special Administrative Law Judge. However, it is not an issue on appeal and it is deemed admitted.
- (8) Aetna Casualty & Surety Company is the insurance carrier for the respondent.
- (9) Average weekly wage was an issue before the Special Administrative Law Judge. However, it has not been made an issue on appeal. Accordingly, the findings by the Special Administrative Law Judge of an average weekly wage of \$686.80 until January 12, 1994 and \$895.71 thereafter is deemed admitted.
- (10) No compensation has been paid.

- (11) No amount for any medical and hospital treatment has been furnished. There was no claim for future medical benefits or physical restoration. The order of the Special Administrative Law Judge that future medical benefits be awarded upon proper application to and approval of the Director has not been raised as an issue on appeal and therefore will be adopted.
- (12) There are no medical or hospital expenses outstanding. The Order of the Special Administrative Law Judge that unauthorized medical expense of up to \$350 is to be paid has not been raised as an issue on appeal and will therefore be adopted.
- (13) There is no claim for an additional period of temporary total disability.
- (14) There is no need for the claimant to be referred for a vocational rehabilitation evaluation.
- (15) The Workers Compensation Fund has been impleaded as an additional party and there has been a stipulation between the respondent and the Fund whereby the respondent will be responsible for 80 percent and the Fund for 20 percent of any award.
- (16) The parties have stipulated to a functional impairment rating of 5 percent.

### ISSUES

The Special Administrative Law Judge included as an issue "whether the Kansas Workers Compensation Fund should be found responsible for payment of some percentage of the compensation, medical expenses and costs in this claim." An award was entered finding the respondent and the Fund each to be liable for one half of "all compensation, medical expenses and administrative costs." However, as the parties had entered into a stipulation as to Fund liability different from that awarded by the Special Administrative Law Judge, Fund liability is an issue on appeal. On appeal, respondent seeks review of the following issues:

- (1) Nature and extent of disability. Specifically, respondent agrees that the award should be limited to claimant's impairment of function, but that it should be for the stipulated 5 percent.
- (2) Fund liability. Specifically, that liability be assessed consistent with the stipulation between respondent and Fund.

Claimant also seeks review of the finding as to the nature and extent of claimant's disability. Specifically, claimant argues for a permanent partial disability award based upon a work disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A series of traumas ending June 15, 1993 caused injury to claimant's low back. A permanent functional impairment rating of 5 percent was stipulated to by the parties. Nevertheless, the Special Administrative Law Judge entered an award for this docketed claim based upon a 7 percent permanent partial disability. The Appeals Board corrects the disability award to reflect the agreed 5 percent impairment.

Following his injury, claimant continued to work for respondent earning a comparable wage. Therefore, there is a presumption of no work disability. K.S.A. 1992 Supp. 44-510e. The presumption has not been overcome. His ultimate termination was due to physical restrictions imposed for a subsequent injury. Claimant is entitled to an award based upon his 5 percent functional impairment.

The respondent and the Fund stipulated to an apportionment of liability in this case. That stipulation provided for the respondent to be responsible for 80 percent of any award, with the Fund bearing the liability for the remaining 20 percent. Nevertheless, the Special Administrative Law Judge entered an award finding the respondent and the Fund to each bear 50 percent of the liability. The Appeals Board corrects that award to conform to the stipulation of the parties. Therefore, we find the respondent liable for 80 percent of the award and the Fund liable for 20 percent.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered May 17, 1995 in Docket No. 181,219 should be modified to award a 5 percent permanent partial disability. The Appeals Board also finds that the Award should be modified to find the respondent liable for 80 percent of the award and the Fund liable for 20 percent.

**IN DOCKET NO. 181,219 AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William H. Byfield, and against the respondent, The Boeing Co. - Wichita, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund for an accidental injury which occurred June 15, 1993 and based upon an average weekly wage of \$686.80 until January 12, 1994 and an average weekly wage of \$895.71 thereafter, for 30.14 weeks of compensation at the rate of \$22.89 per week in the sum of \$689.90, and 384.86 weeks of compensation at the rate of \$29.86 per week or \$11,491.92 for a 5 percent permanent partial general body disability, making a total award of \$12,181.82.

As of June 30, 1996, there is due and owing claimant 30.14 weeks of permanent partial general body impairment of function compensation at the rate of \$22.89 per week or \$689.90, followed by 128.57 weeks of permanent partial general body impairment of function compensation at the rate of \$29.86 per week or \$3,839.10 for a total of \$4,529.00, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$7,652.82 is to be paid for 256.29 weeks at the rate of \$29.86 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the director. Unauthorized medical expense of up to \$350 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and administrative costs are to be borne 80 percent by the respondent and 20 percent by the Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 1992 Supp. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed 80 percent to the respondent and 20 percent to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	\$150.00
Barber & Associates	
Transcript of Preliminary Hearing (2-10-94)	\$180.00
Transcript of Preliminary Hearing (4-5-94)	\$105.70
Transcript of Regular Hearing	\$166.95
Alexander Reporting	
Deposition of Kenneth D. Zimmerman, M.D.	\$820.60
Deposition of Steve Benjamin	\$132.68
Deposition of Lawrence R. Blaty, M.D.	\$255.16
Deposition of James Molski	\$291.00
Deposition of William H. Byfield	\$206.88

**Docket No. 181,220**

**RECORD**

The Appeals Board has considered the record listed in the Award of the Special Administrative Law Judge.

**STIPULATIONS**

The May 18, 1995 Award of the Special Administrative Law Judge does not contain the stipulations of the parties. They are as follows:

- (1) Sedgwick County is the county in which it is claimed that claimant met with personal injury by accident.
- (2) Claimant alleges he met with personal injury by accident on March 1, 1992 and each and every day worked thereafter and June 1, 1992 and each and every day worked thereafter.
- (3) Whether claimant's alleged accidental injury arose out of and in the course of his employment was an issue before the Special Administrative Law Judge. It has been raised as an issue on appeal only to the extent that respondent would treat the repetitive trauma conditions in Docket Nos. 181,220, 181,221 and 181,222 as all one accident. Injury by accident arising out of and in the course of employment was otherwise admitted.
- (4) Notice was an issue before the Special Administrative Law Judge, however it has not been made an issue on appeal. Therefore, it is deemed admitted.
- (5) The relationship of employer and employee existed on the accident dates alleged.
- (6) The parties are covered by the Kansas Workers Compensation Act.
- (7) Aetna Casualty & Surety Company is the insurance carrier for the respondent.
- (8) Average weekly wage was an issue before the Special Administrative Law Judge. However, it has not been made an issue upon appeal. Accordingly, the findings by the Special Administrative Law Judge of an average weekly wage of \$682.00 until January 12, 1994 and \$825.91 thereafter is deemed admitted.
- (9) Respondent has paid 6 weeks of temporary total disability compensation at the rate of \$289 per week totaling \$1,734.

- (10) Medical and hospital treatment totaling \$8,759.71 has been furnished. There was no claim for future medical benefits or physical restoration. The order of the Special Administrative Law Judge that future medical benefits be awarded upon proper application to and approval of the Director has not been raised as an issue on appeal and therefore will be adopted.
- (11) There are no medical or hospital expenses outstanding. The order of the Special Administrative Law Judge that unauthorized medical expense of up to \$350 is to be paid was not made an issue on appeal. Therefore that order will be adopted by the Appeals Board.
- (12) There is no claim for an additional period of temporary total disability.
- (13) There is no need for the claimant to be referred for a vocational rehabilitation evaluation.
- (14) The Workers Compensation Fund has been impleaded as an additional party and there has been a stipulation between the respondent and the Fund whereby the respondent will be responsible for 20 percent and the Fund for 80 percent of any award.
- (15) The parties have stipulated to a functional impairment rating of 15.5 percent whole body impairment for the alleged neck, shoulder and cervical spine injuries.

#### ISSUES

- (1) Whether claimant suffered personal injury by accident arising out of and in the course of employment with respondent by a series of events beginning March 1, 1992 and by a series of events beginning June 1, 1992.
- (2) Nature and extent of disability.
- (3) Timely written claim. This issue was listed in respondent's Application for Review but was neither briefed nor argued. This issue may have been abandoned but, as this is unclear, we will decide the issue.
- (4) Fund liability. Again, this is an issue in order to correct the Award to reflect the stipulation of the respondent and Fund
- (5) Whether respondent is entitled to a credit pursuant to K.S.A. 1992 Supp. 44-510a.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This claim involves injuries to claimant's right elbow, right shoulder and neck. The date of accident was initially alleged to have occurred on June 1, 1992 and each and day worked thereafter. This was later amended to allege injury commencing March 1, 1992. The respondent argues the elbow and shoulder are separate injuries which occurred March 1, 1992 and June 1, 1992, respectively. Respondent argues, in the alternative, all of the injuries in Docket Nos. 181,220, 181,221 and 181,222 should be considered part of the same series of accidents and combined.

Claimant first missed work as a result of these injuries on September 28, 1992. We find this to be claimant's date of accident. Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). On that date claimant underwent elbow and shoulder surgery. Claimant was subsequently released and returned to work in February 1993. Claimant worked until September 24, 1993 when he was taken off work for carpal tunnel syndrome surgery and was subsequently laid off.

Claimant returned to work in February 1993 and performed his regular job duties until he sustained a new injury. During the period following his return to work from the elbow and shoulder surgeries, claimant earned a comparable wage. Therefore, the presumption of no work disability applies. Because claimant's termination from employment with the respondent was due to a subsequent and intervening accident, the Appeals Board finds that the presumption of no work disability has not been overcome. Therefore, claimant's award should be based upon his functional impairment. The parties stipulated to a 15.5 percent functional impairment. The Special Administrative Law Judge found a 29 percent functional impairment. The Appeals Board will correct the Award to reflect the parties' agreement. Claimant is entitled to a 15.5 percent permanent partial disability.

Written claim was timely made. We have found an accident date of September 28, 1992. Claim was made on August 13, 1993. However, the record does not establish that respondent timely filed a report of accident to the director. Therefore, claim was made within the time permitted by statute. See K.S.A. 44-520a and K.S.A. 44-557 (Ensley).

The respondent and the Workers Compensation Fund entered into a stipulation whereby the respondent would be responsible for 20 percent of any award entered in this docketed claim and the Fund liable for the remaining 80 percent. The Special Administrative Law Judge found no Fund liability. The Appeals Board will correct the Award to conform with the stipulation of the parties. Wherefore, the respondent is responsible for 20 percent and the Fund is responsible for 80 percent of this Award.

Respondent argues it is entitled to a K.S.A. 44-510a (Ensley) credit in this docketed claim. The Appeals Board disagrees. The injuries in Docket No. 181,219 are to a different



part of the body. The injuries in Docket Nos. 181,221 and 181,222 occurred subsequent to the injuries in this docketed claim. Therefore, no credit can be allowed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered on May 18, 1995 in Docket No. 181,220 should be modified. The Appeals Board corrects the compensation in the award to reflect the parties' agreement of a 15.5 percent permanent partial disability. The Appeals Board also finds that the award should be modified to find the respondent liable for 20 percent of the award and Fund liable for 80 percent.

**IN DOCKET NO. 181,120 AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William H. Byfield, and against the respondent, The Boeing Co. - Wichita, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund for an accidental injury which occurred September 28, 1992 and based upon an average weekly wage of \$682.00 until January 12, 1994 and an average weekly wage of \$825.91 thereafter, for 6 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$1,734.00, followed by 61.29 weeks at the rate of \$70.48 per week or \$4,319.72, followed by 347.71 weeks at the rate of \$85.35 per week or \$29,667.05 for a 15.5% permanent partial general body impairment of function, making a total award of \$35,790.77.

As of June 30, 1996, there is due and owing claimant 6 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$1,794.00, followed by 61.29 weeks of permanent partial disability compensation at the rate of \$70.48 per week or \$4,319.72, followed by 128.57 weeks of permanent partial disability compensation at the rate of \$85.35 per week or \$10,973.45 for a total of \$17,087.17 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$18,703.60 is to be paid for 219.14 weeks at the rate of \$85.35 per week, until fully paid or further order of the Director.

All other findings, conclusions and orders of the Special Administrative Law are hereby adopted by the Appeals Board.

### **Docket No. 181,221**

### **RECORD**

The Appeals Board has considered the record listed in the Award of the Special Administrative Law Judge.

### **STIPULATIONS**

The May 22, 1995 Award of the Special Administrative Law Judge does not contain the stipulations of the parties. They are as follows:

- (1) Sedgwick County is the county in which it is claimed that claimant met with personal injury by accident.
- (2) Claimant alleges he met with personal injury by accident on May 28, 1993 and each day worked thereafter until September 24, 1993.
- (3) Whether claimant's alleged accidental injury arose out of and in the course of his employment was an issue before the Special Administrative Law Judge. It has been raised as an issue on appeal only to the extent that respondent would treat the repetitive trauma conditions in Docket Nos. 181,220, 181,221 and 181,222 as all one accident. Injury by accident arising out of and in the course of employment was otherwise admitted.
- (4) Notice was an issue before the Special Administrative Law Judge, however it has not been made an issue on appeal. Therefore, it is deemed admitted.
- (5) The relationship of employer and employee existed on the accident dates alleged.
- (6) The parties are covered by the Kansas Workers Compensation Act.
- (7) There was timely written claim made.
- (8) Aetna Casualty & Surety Company is the insurance carrier for the respondent.
- (9) Average weekly wage was an issue before the Special Administrative Law Judge. However, it has not been made an issue upon appeal. Accordingly, the findings by the Special Administrative Law Judge of an average weekly wage of \$686.80 until January 12, 1994 and \$895.71 thereafter is deemed admitted.
- (10) Respondent had paid 22 weeks of temporary total disability compensation at the rate of \$299 per week for a total of \$6,578.
- (11) Medical and hospital treatment totaling \$12,278.59 has been furnished. There was no claim for future medical benefits or physical restoration. The Order of the Special Administrative Law Judge that future medical benefits be awarded upon proper application to and

approval of the Director has not been raised as an issue on appeal and therefore will be adopted.

- (12) There are no medical or hospital expenses outstanding. The order of the Special Administrative Law Judge that unauthorized medical expense of up to \$350 is to be paid will be corrected to conform to the "new act" limit of \$500. Also, the parties agreed that if a "new act" date of accident were found to apply that the cost of the IME by Dr. Lawrence R. Blaty would not be paid from the unauthorized medical allowance since his examination was used to obtain a functional impairment rating.
- (13) There is no claim for an additional period of temporary total disability.
- (14) There is no need for the claimant to be referred for a vocational rehabilitation evaluation.
- (15) The Workers Compensation Fund has been impleaded as an additional party. There has been a stipulation between the respondent and the Fund whereby the respondent will be responsible for 20 percent and the Fund for 80 percent of any award.
- (16) The parties have stipulated to a 10.5 percent functional impairment to the body as a whole.

#### ISSUES

- (1) Whether claimant sustained injury by accident arising out of and in the course of his employment.
- (2) Nature and extent of disability.
- (3) Fund liability. Specifically, whether the stipulation between respondent and Fund should be approved.
- (4) Whether respondent is entitled to a credit pursuant to K.S.A. 44-510a.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This injury involved in this claim is bilateral carpal tunnel syndrome. The claimant was ultimately taken off work due to this injury. Therefore, it is a work disability claim.

The last day claimant worked for respondent before his medical layoff was September 24, 1993. The claimant initially alleged an accident date of January 15, 1992

and each day worked thereafter. This was subsequently amended to allege September 24, 1993 as the accident date. The Special Administrative Law Judge found an accident of May 28, 1993 and awarded work disability based upon the "old law" K.S.A. 44-510e. Both claimant and respondent agree that the rationale employed by the Kansas Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) would apply to the facts in this case. The Appeals Board agrees. Accordingly, claimant's last date worked will control. The accident date of September 24, 1993 will be the date from which benefits will be computed and will likewise control the applicable law.

Work disability is:

"The extent of permanent partial general disability . . . expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." K.S.A. 44-510e.

The record does not contain any testimony in the opinion of a physician concerning the extent of claimant's loss of task-performing ability. Therefore, claimant has failed to carry his burden in this regard. In the absence of any evidence of task loss, it will be assumed to be 0 percent. The respondent determined that it could not accommodate claimant's restrictions and claimant was terminated. He was not subsequently offered employment within his restrictions, nor does the record reflect that he has been able to otherwise obtain work. As of the date of regular hearing, claimant was not working. Therefore, claimant has a 100 percent wage loss. Averaging the 100 percent wage loss with the 0 percent task loss results in a work disability of 50 percent.

The respondent and the Fund entered into a stipulation whereby respondent would be liable for 20 percent of any award in this docketed claim, and the Fund would be liable for 80 percent. The Special Administrative Law Judge assessed equal liability against the respondent and the Fund. The Appeals Board will correct this finding and order respondent liable for 20 percent and the Fund liable for 80 percent of the award under this docket number.

Respondent also raised an issue concerning a credit. Again, the Appeals Board finds the injury and resulting disability in this case not to have been contributed to by any prior disability. Accordingly, no credit is applicable to this award. K.S.A. 44-510a.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated May 22, 1996

should be, and hereby is, modified to reflect a 50 percent work disability for a September 24, 1993 accident; the Appeals Board also modifies the Award to find the respondent liable for 20 percent of the compensation and the Fund is liable for 80 percent.

**IN DOCKET NO. 181,221 AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William H. Byfield, and against the respondent, The Boeing Co. - Wichita, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund for an accidental injury which occurred September 24, 1993 and based upon an average weekly wage of \$686.80 until January 12, 1994 and an average weekly wage of \$895.71 thereafter, for 22 weeks temporary total disability compensation at the rate of \$313.00 per week or \$4,917.23, followed by 204 weeks of permanent partial disability compensation at the rate of \$313.00 per week or \$63,852.00 for a 50 percent permanent partial general body impairment of function, making a total award of \$70,738.00.

As of June 30, 1996, there is due and owing claimant 22 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$6,886.00, followed by 122.29 weeks of permanent partial disability compensation at the rate of \$313.00 per week in the sum of \$38,276.77, for a total of \$45,162.77 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$25,575.23 is to be paid for 81.71 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

All other findings, conclusions and order of the Special Administrative Law Judge are hereby adopted by the Appeals Board to the extent that they are not inconsistent with the findings, conclusions and orders contained herein.

### **Docket No. 181,222**

#### **RECORD**

The Appeals Board has considered the record listed in the Award of the Special Administrative Law Judge.

#### **STIPULATIONS**

The May 19, 1995 Award of the Special Administrative Law Judge does not contain the stipulations of the parties. They are as follows:

- (1) Sedgwick County is the county in which it is claimed that claimant met with personal injury by accident.
- (2) Claimant alleges he met with personal injury by accident on January 15, 1992 and on each day worked thereafter.

- (3) Whether claimant's alleged accidental injury arose out of and in the course of his employment was an issue before the Special Administrative Law Judge. It has been raised as an issue on appeal only to the extent of whether claimant has a claim separate from that alleged in Docket No. 181,220. It is otherwise admitted that the elbow injury arose out of and in the course of employment with respondent.
- (4) Notice was an issue before the Special Administrative Law Judge, however it has not been made an issue on appeal. Therefore, it is deemed admitted.
- (5) The relationship of employer and employee existed on the accident dates alleged.
- (6) The parties are covered by the Kansas Workers Compensation Act.
- (7) There was an issue of timely written claim before the Special Administrative Law Judge. However, it is not an issue on appeal and it is deemed admitted.
- (8) Aetna Casualty & Surety Company is the insurance carrier for the respondent.
- (9) Average weekly wage was not an issue before the Special Administrative Law Judge. It has been stipulated that claimant's average weekly wage was sufficient to warrant the maximum weekly compensation benefits.
- (10) No compensation has been paid.
- (11) No medical and hospital treatment has been furnished. There was no claim for future medical benefits or physical restoration.
- (12) There are no medical or hospital expenses outstanding.
- (13) There is no claim for an additional period of temporary total disability.
- (14) There is no need for the claimant to be referred for a vocational rehabilitation evaluation.
- (15) The Workers Compensation Fund has been impleaded as an additional party and there has been a stipulation between the respondent and the Fund whereby the respondent will be responsible for 20 percent and the Fund for 80 percent of any award.

- (16) The parties have stipulated to a functional impairment rating of 5 percent to the arm.

### **ISSUES**

The specific issues for which claimant seeks review are:

- (1) Whether claimant has a separate claim for the elbow injury.
- (2) Nature and extent of claimant's disability.

The issues raised by respondent are:

- (1) Injury by accident arising out of and in the course of employment.
- (2) Nature and extent of disability.
- (3) Whether there should be a credit pursuant to K.S.A. 44-510a.
- (4) Fund liability. Again, this is an issue solely to correct the award to conform to the agreement between respondent and Fund.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant alleges new injury to his right elbow in this docketed claim, separate from that alleged in Docket No. 181,220. This claim is for the aggravation of claimant's prior right-elbow injury after his return to work following his release from the right-elbow surgery in Docket No. 181,219. A right lateral epichondrolectomy and radial nerve decompression surgery was performed on September 27, 1993 by Dr. Mark Melhorn. This condition represented a permanent aggravation of claimant's right-elbow condition over that which existed at the time of claimant's prior surgery. Accordingly, a separate award is appropriate in this case. Furthermore, the Appeals Board does not consider this right-elbow condition to be part of the carpal tunnel syndrome injury which was the subject of Docket No. 181,220.

The parties stipulated to a 5 percent functional impairment of the right arm. The Special Administrative Law Judge found no permanent impairment. The Appeals Board will correct the award of the Special Administrative Law Judge to conform to the agreement of the parties. Therefore, the claimant is entitled to an award in this case for a 5 percent scheduled injury to the right arm. K.S.A. 44-510d.

The date of accident for this docketed claim is found to be September 24, 1993, claimant's last day worked. Berry v. Boeing Military Airplanes, *supra*.

WILLIAM H. BYFIELD

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DOCKET NOS.

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Again, respondent's request for a credit pursuant to K.S.A. 44-510a is denied. The 5 percent functional impairment represents the extent to which claimant's loss of use was increased over and above that which he possessed prior to this injury. Accordingly, as it does not include any contribution from the prior disability, no credit is due.

Pursuant to their stipulation, the respondent is responsible for 20 percent of this award and the Fund is responsible for the other 80 percent.

**Award**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated May 19, 1995 should be, and hereby is, reversed.

**IN DOCKET NO. 181, 222 AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William H. Byfield, and against the respondent, The Boeing Co. - Wichita, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred September 24, 1993 and based upon an average weekly wage of \$686.80 until January 12, 1994 and an average weekly wage or \$895.71 thereafter, for 10.50 weeks at the rate of \$313.00 per week or \$3,286.50 for a 5 percent permanent partial loss of use of the arm making a total award of \$3,286.50, which is ordered paid in one lump sum less any amounts previously paid.

All compensation, medical expenses and administrative costs are to be borne 20 percent by the respondent and 80 percent by the Fund.

The Special Administrative Law Judge fee is hereby assessed 20 percent to the respondent and 80 percent to the Fund to be paid direct:

William F. Morrissey

Special Administrative Law Judge

\$50.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1996.

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BOARD MEMBER



**WILLIAM H. BYFIELD**

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**DOCKET NOS.**

**181,219**

**181,220**

**181,221**

**181,222**

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
Frederick L. Haag, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
John D. Clark, Administrative Law Judge  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director